IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1150

MANLEY OIL CORPORATION, a Corporation, L. B. MANLEY, J. C. SHOEMATE, FLORENCE SHOEMATE, HELMERICH & PAYNE, INC., a Corporation, ED MORTON and F. M. LOPER,

Petitioners,

vs.

SHELL OIL COMPANY, INCORPORATED, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CRAIG VAN METER,
Mattoon, Illinois,
FRED H. KELLY,
Mattoon, Illinois,
Attorneys for Respondent.

JOHN C. QUILTY,
Centralia, Illinois,
Of Counsel.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

INDEX.

Cases Cited.

STATUTE.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1150

MANLEY OIL CORPORATION, a Corporation, L. B. MANLEY, J. C. SHOEMATE, FLORENCE SHOEMATE, HELMERICH & PAYNE, INC., a Corporation, ED MORTON and F. M. LOPER,

Petitioners,

vs.

SHELL OIL COMPANY, INCORPORATED, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

Respondent deems it advisable to make a brief additional statement in order to bring before this Court the issues presented by the petition.

This action was brought by Respondent to enjoin Petitioners from drilling for oil and gas upon a certain two-acre tract of land located in the northwest corner of the southeast quarter of the southeast quarter of section twenty-four (24), township six (6) south, range two (2)

east of the Third Principal Meridian, Franklin County, Illinois. After a hearing upon the merits the District Court found that the Respondent and its lessors had no title to the oil and gas under the said two-acre tract, and denied the prayer for a permanent injunction, and dismissed the complaint for want of equity. Thereafter, an appeal was perfected to the United States Circuit Court of Appeals, For the Seventh Circuit. The errors relied upon arose out of the finding and ruling of the District Court as to title and right to injunction, the construction of the deed (Defendants' Exhibit 1, Tr. 82), and a construction of the deed (Plaintiff's Exhibit 6, Tr. 162), and rulings on evidence.

After hearing and argument in the United States Circuit Court of Appeals, For the Seventh Circuit, the decree of the District Court was reversed and the Circuit Court of Appeals, by its judgment and opinion entered on the 3rd day of December, 1941, found that the Respondent was the owner of the oil and gas under said two-acre tract and entitled to such injunctive relief.

The Respondent claims the sole right and title to the oil and gas under said two-acre tract and the right to injunctive relief by virtue of an oil and gas lease given by the surviving husband and heirs of Lou McKemie, deceased, to E. S. Adkins on June 27, 1940, (Plaintiff's Exhibit 4, Tr. 62-68) which lease was assigned by Adkins to the Respondent (Plaintiff's Exhibit 5, Tr. 69-71).

The Petitioner, Manley Oil Corporation, at the time the suit was brought on February 20, 1941, was drilling an oil well on said two-acre tract under an oil and gas lease dated January 11, 1941, from the Petitioners, J. C. Shoemate and Florence Shoemate, his wife, to the Manley Oil Corporation (Defendants' Exhibit 11, Tr. 100-103). Pending the decision of the District Court a temporary restraining order was entered (Tr. 39-40), and Petitioner ceased drilling.

The common source of title of all of the parties to this suit is Thomas M. McKemie, who, it is stipulated, (Tr. 112), was on August 27, 1907, the owner in fee of all of the above described quarter quarter section, including the two acres in controversy, subject to a prior deed by a former owner (Plaintiff's Exhibit 1, Tr. 55-56) by which deed the underlying coal, with the right to mine same, had been conveyed to the Benton Coal Company. On August 27, 1907, Thomas M. McKemie and Lou McKemie, his wife, conveyed to Walter S. Mooneyham the two-acre tract here in controversy by warranty deed in statutory form, in which the estate and interest conveyed was in words and figures as follows (Defendants' Exhibit 1, Tr. 82):

> "The surface only of a tract of land described as follows, Beginning at the Northwest corner of the South East quarter of the South East quarter of Section 24, Town 6, South and in Range 2 East of the 3rd P.M. Thence south 23 rods to the center of the public road as now located, thence east along the center of said public road 14 rods, thence north 23 rods to the north line of said SE¼ SE¼ thence West to the place of beginning containing 2 acres more or less. This deed is made subject to a certain deed to the Benton Coal Company recorded in Deed Record 45, page 10."

By mesne conveyances, the title and interest to the surface only conveyed to Walter S. Mooneyham in and to the said two-acre tract by the above described deed from Thomas M. McKemie and wife, was acquired by Petitioners, J. C. Shoemate and Florence Shoemate, as joint tenants, from whom the Petitioner, Manley Oil Corporation, holds its oil and gas lease (Tr. 100-103).

In 1918 Thomas M. McKemie mortgaged all of the forty acres including the two acres in question to the Newton State Bank & Trust Company (Tr. 161), and, thereafter, to correct the fact that this mortgage covered the two-acre

tract, Lou McKemie and Thomas M. McKemie, her husband, executed a quitclaim deed for the two-acre tract to J. A. Dalby, of Benton, Illinois, of date the 18th day of July, 1922, and recorded on that same date. This deed (Plaintiff's Exhibit 6) reserved in the grantors, the McKemies, the coal, oil and gas and other minerals underlying this two-acre tract (Tr. 162). As set forth in Finding of Fact Number Five (5) (Tr. 179), the said J. A. Dalby, the grantee in said deed, was then the owner of the interest in the lands conveyed by Defendants' Exhibit 1 (Tr. 82) to Walter S. Mooneyham, being the deed upon which the Petitioners base their title. Thomas M. McKemie had, prior to the date of the deed to Dalby, on October 7, 1921, given to his wife, Lou McKemie, a quitclaim deed, based upon a consideration of one dollar and love and affection, to all of said southeast quarter of the southeast quarter of said section 24, together with a number of other tracts of land. (Plaintiff's Exhibit 3, Tr. 58-62.) After the death of Lou McKemie in 1936, her husband and heirs made the lease to Respondent's Assignor, Adkins.

Upon the hearing in the District Court, the Court permitted certain witnesses to testify to an alleged custom about the meaning of the word "surface" in Franklin County, Illinois, in 1907, at the time the deed from McKemie to Mooneyham, Defendants' Exhibit 1, (Tr. 82), was executed and delivered. This testimony was admitted over the objection of the Respondent and after the District Court had stated repeatedly (Tr. 121; 122) that he doubted the competency of said evidence. The Court in his Memorandum of Decision stated that "this evidence was received subject to objections, but is now held admissible and considered." (Tr. 175.)

Petition for rehearing in this case was denied on January 23, 1942.

The mandate was issued in accordance with the rules of the United States Circuit Court of Appeals, For the Seventh Circuit, and an order was entered upon said mandate in the District Court for the Eastern District of Illinois on February 12, 1942, vacating and setting aside the prior judgment and decree of the District Court, which judgment is the judgment involved in this petition for a writ of certiorari, and finding in pursuance to the mandate of the United States Circuit Court of Appeals, For the Seventh Circuit, that Respondent was the owner of the oil and gas under this said two-acre tract of land and issuing a permanent injunction as prayed for by this Respondent. This order of date the 12th day of February, 1942, which was entered upon the mandate, still stands in the District Court for the Eastern District of Illinois and no stay of the mandate has ever been obtained either in the United States Circuit Court of Appeals, For the Seventh Circuit, or in this Court.

The opinion of the United States Circuit Court of Appeals, For the Seventh Circuit, in this case appears in 124 Fed. (2nd) 714.

SUMMARY OF ARGUMENT.

NO GROUNDS EXIST WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS POWER TO GRANT A WRIT OF CERTIORARI.

I.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under Section 240 (a) of the Judicial Code (28 U.S.C.A. 347 (a)) is to be exercised only when there are special and important reasons therefor.

The petition presents no questions of gravity or importance because of the legal, economic or social problems involved, and this litigation is not of such importance to justify this Court's issuance of its writ of certiorari.

II.

The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.

This two-acre tract of land in question is located in the State of Illinois, and it was recognized by the United States Circuit Court of Appeals, For the Seventh Circuit, and by the litigants that their respective interests in the property should be determined by the statutory and case law of that State. However, there is no decision in which a deed has been construed where the granting clause is identical with that found in this deed. (Defendants' Exhibit 1, Tr. 82.) Under such circumstances, the United

States Circuit Court of Appeals, For the Seventh Circuit, followed the established judicial precedents in analyzing the issues and in reaching its decision was controlled and guided by the applicable Illinois law of conveyancing and the applicable Illinois cases. The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, shows that the Illinois cases were carefully considered and followed in arriving at the decision by the Circuit Court of Appeals in this case.

III.

The evidence of custom followed in this case and admitted by the District Court for the Eastern District of Illinois was inadmissible and the deed in this case was unambiguous and no evidence of custom under the Illinois authorities was admissible to add to, change or vary the terms of the deed (Defendants' Exhibit 1, Tr. 82).

In Illinois the rule has been stated on numerous occasions that evidence of custom or usage is never admissible to vary or contradict, either expressly or by implication, the terms of a written instrument.

This deed in this case was unambiguous. The word "surface" has a fixed meaning under the Illinois decisions.

IV.

In this case there was a correction deed (Plaintiff's Exhibit 6, Tr. 162-163) subsequently executed and delivered, which correction deed expressly reserved the coal, oil, gas and other minerals under this two-acre tract, and this correction deed is controlling in determining what the parties intended to convey and did convey by the prior conveyance (Defendants' Exhibit 1, Tr. 82).

The parties owning the lands in question and the McKemies in the year 1922 adopted a construction of the

meaning of Defendants' Exhibit 1, by the delivery and acceptance of Plaintiff's Exhibit 6 (Tr. 162-3) from the McKemies to the then owner of the surface of this two-acre tract, J. A. Dalby. In 1918 Thomas M. McKemie mortgaged all of the forty acres, including the two-acre tract in question, to the Newton State Bank & Trust Company (Tr. 161) and, thereafter, to correct the fact that this mortgage covered the two-acre tract Tom McKemie executed the affidavit (Defendants' Exhibit "I," Tr. 161-162) and also executed and delivered to J. A. Dalby, the then owner of the surface of this two-acre tract, a quit-claim deed (Plaintiff's Exhibit 6, Tr. 162-163). This deed, Plaintiff's Exhibit 6, was recorded on the 18th day of July, 1922. This correction deed (Plaintiff's Exhibit 6) specifically reserved the coal, oil, gas and other minerals under said two-acre tract.

Under the Illinois authorities, this deed, Plaintiff's Exhibit 6 (Tr. 162-163) amounted to a construction of the meaning of the prior deed, Defendants' Exhibit 1 (Tr. 82) by the interested parties and such construction is entitled to great weight in determining the proper interpretation to be placed upon the deed (Defendants' Exhibit 1, Tr. 82).

Most certainly, as this deed (Plaintiff's Exhibit 6) was of record when the Shoemates purchased the surface of the premises in the year 1930, they were bound by this construction previously placed upon Defendants' Exhibit 1 by virtue of the execution and delivery of the correction deed (Plaintiff's Exhibit 6, Tr. 162-163.)

ARGUMENT.

I.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under Section 240 (a) of the Judicial Code (28 U.S.C.A. 347 (a)) rests in the discretion of the Court. It has been many times declared that this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

That this case, which was submitted and decided by the Circuit Court of Appeals, is not of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari is apparent from the petition. This is just a private suit over title to property. A similar suit may never arise over this kind of a deed in the Federal Court even if it is conceded that there are certain additions in villages and towns in Franklin County, Illinois, which are laid out on the "surface" or 'surface only." There is nothing to indicate in this record that any of those additions in villages and towns in Franklin County, Illinois, are oil lands or that there are any other oil properties in Franklin County, Illinois, where a similar deed is involved. That does not appear from this record.

No important legal, economic or social problem is involved, and it is a question to be decided upon the ordinary principles of law, and is not a cause of special importance or gravity beyond the importance to the litigants themselves.

II.

The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.

An examination of the opinion of the Circuit Court of Appeals in this case shows that the Circuit Court of Appeals was basing its decision in this case upon the Illinois cases considered and cited in its opinion. Although at the conclusion of the opinion the Court says:

> "Since the Illinois Courts have not passed upon this question, we accept the rule as set forth in the Jividen case from Ohio rather than the Ramage case from West Virginia,"

still it is not permissible to pick out isolated phrases from the opinion and contend therefrom that the Court was not basing its opinion upon the Illinois law.

An examination of the opinion shows that the Court did cite Illinois cases and did rely upon the general principles of law as decided by the Illinois courts in arriving at its opinion in this case.

We contend that the case of *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, and the case of *Railroad Commission of Texas* v. *Pullman Company, et al.*, 312 U. S. 496-500, have absolutely no application under the facts of this case and that from a consideration of the cases in Illinois the opinion of the Circuit Court of Appeals in this case was the only correct conclusion that could have been arrived at.

Counsel take the position that the Supreme Court of Illinois has never passed upon the exact language and the exact facts of the present case. If it be conceded for the sake of argument merely that that is true, still it

would be the duty of the Federal Court to follow the recognized and established Illinois law of construction as announced in analogous or similar cases.

Petitioners made no contention in this case either in the District Court or in the Circuit Court of Appeals that the Court should stay the proceedings until appropriate proceedings were had in the Courts of Illinois. Defendants did, however, make that contention in the case of *Chicago, Wilmington & Franklin Coal Company* v. *Herr*, decided by the Circuit Court of Appeals of the Seventh Circuit on May 2, 1942, and not yet officially reported. In that case the Court said:

> "In support of the contention that the District Court should have stayed the proceedings, the argument is that there is no positive and controlling authority to guide us. In our opinion, no more uncertainty attends the disposition of the questions here involved than is present in the decisions of most legal questions. Under such circumstances, it is our duty to ascertain from all the available data what the state law is and apply it. *West* v. *A. T. T. Co.*, 311 U. S. 223, 237, and *MacGregor* v. *State Mutual, etc.*, decided by the United States Supreme Court February 16, 1942. See *Hicks* v. *Thomson*, decided by this Court April 8, 1942. Our decision in the present case is guided by the decisions of the Illinois Courts."

This rule is recognized by the Supreme Court of the United States in the case of *Fidelity Union Trust Co., et al.* v. *Field*, 311 U. S. 169, 61 Sup. Ct. 176, at p. 178, where the Court said:

> "We think that this ruling was erroneous. The highest state court is the final authority on the state law (*Beals* v. *Hale*, 4 How. 37, 54, 11 L. Ed. 865; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 114 A. L. R. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and

apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 209, 58 S. Ct. 860, 862, 82 L. Ed. 1290."

Also the rule is well stated by the Circuit Court of Appeals, For the Fourth Circuit, in the case of *New England Mut. Life Ins. Co.* v. *Mitchell*, 118 Fed. (2d) 414, at p. 420, where it is said:

"Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established *stare decisis* rule and its limitations. Cf. *West* v. *American Tel. & Tel. Co.*, 61 S. Ct. 179, 85 L. Ed. .... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. *The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local courts will reach the same decision when the question comes before it.* To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

It is the contention of the Respondent that the words of the deed are unambiguous and are so clear in meaning and so plainly limit the conveyance to the superincumbent soil, not including the coal, oil, gas and other minerals, that the meaning of this deed must be determined solely from the language found therein.

The deed from McKemie to Mooneyham (Defendants' Exhibit 1, Tr. 82) conveyed:

> "The *surface only* of a tract of land described as follows: Beginning at the Northwest corner of the South East quarter of the South East quarter of Section 24, Town 6 South and in Range 2 East of the 3rd P. M., thence South 23 rods to the center of the public road as now located, thence East along the center of said public road 14 rods, thence North 23 rods to the North line of said SE¼ SE¼ thence West to the place of beginning containing 2 acres more or less. This deed is made subject to a certain deed to the Benton Coal Company recorded in Deed Record 45, page 10."

The deed to the Benton Coal Company therein referred to is Plaintiff's Exhibit 1 (Tr. 55-57) which conveyed the following:

> "All the coal in, upon and under all of the following described real estate, to-wit: The South East fourth of the Southeast Quarter of Section Twenty-four (24) and the Northeast fourth of the Northeast Quarter of Section Twenty-five (25), all in Township Six (6) South, Range Two (2) East of the Third P. M., also the South West fourth of the South West Quarter of Section Nineteen (19) and the North west fourth of the North West quarter of Section Thirty (30), all in Township Six (6) South, Range Three (3) East of the Third P. M., with the right to mine and remove said coal free and clear of any liability whatever to owner of superincumbent soil all of said land and coal being situated in the County of Franklin, in the State of Illinois."

It is apparent that the purpose of the recitation that the deed (Defendants' Exhibit 1) was subject to the deed to the Coal Company was to relieve the grantors from any liability under their warranty. The prior quit-claim deed to the Benton Coal Company gave the company the right to mine and remove the coal without damage to the

owner of the superincumbent soil, and it was therefore necessary for Thomas M. McKemie to make this deed of the surface only to Walter S. Mooneyham subject to the prior quit-claim deed. Otherwise, he might have been liable on his warranty. The fact that the deed to Walter S. Mooneyham was made subject to the prior deed of the coal would not enlarge the provisions of the grant, which was the surface only.

The Supreme Court of Illinois has repeatedly recognized that "surface" is the superincumbent soil not including the coal, oil, gas and other minerals. While the Illinois Court has never been called upon to adopt an express definition of the word "surface," yet the Illinois cases have so conclusively announced said rule, that it is the settled law in Illinois that the "surface" is a separate estate from the coal, oil, gas and other minerals estate. This was clearly announced in the case of *Threlkeld* v. *Inglett*, 289 Ill. 90-96, where the Court said:

> "The conveyance was to be of the coal, oil and gas under the land, with the right to mine and remove the same, and, when anything is granted, all the means to attain it and all the fruits and effects of it are granted also, and pass, together with the grant of the thing itself, without any words to that effect. • • • Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and therefore the grantor not only conveyed the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted. The deed, when made, would not only pass the coal, oil, and gas, with the right to mine and remove the same, but also the right to enter upon and use so much of the surface of the land as might be necessary to the enjoyment of the property and rights conveyed, and the agreement was merely that the land taken for such use should be paid for, when located, at the rate of $150 an acre."

The Illinois Court there recognized that a conveyance of coal, oil and gas constituted a severance from the surface, but said that under such a conveyance there was an implied right of entry upon the *surface* for the purpose of mining and removing the coal, oil and gas. Therefore, the word "surface" would not include the coal, oil, gas and other minerals.

This same rule was again recognized by the Supreme Court of Illinois in the case of *Renfro, et al.* v. *Hanon*, 297 Ill. 353-354.

In that case also, there was a conveyance of the coal, oil and other minerals specifically named, and the Court held that possession of the surface did not carry with it possession of the minerals under the surface. The Court thereby recognized that the surface covered the superincumbent part of the land and did not include the oil, gas or other minerals.

The rule that the "surface" is the superincumbent part of the land and does not include the minerals was again announced by the Supreme Court of Illinois in the case of *Lloyd* v. *Catlin Coal Co.*, 210 Ill. 460-468.

The same rule is announced in the case of *Kinder* v. *LaSalle County Coal Co.*, 301 Ill. 362, at pp. 364-367, where it is said (italics ours):

> "Title to the minerals, *distinct* from title to surface of land, may be proven in exactly the same way as title to *the surface*. (*Catlin Coal Co.* v. *Lloyd*, 176 Ill. 275). Title to the mineral stratum may therefore be shown by proof of adverse possession, but the difficulty with respect to getting title of such an estate by adverse possession is found in the difficulty of getting and proving actual possession. By a severance separate estates are created which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other."

Furthermore, since the opinion of the District Court in the present case and also since the opinion of the Circuit Court of Appeals in the present case, at the January Term 1942, in a case in which the opinion is now final although not yet reported, the Supreme Court of Illinois has re-affirmed the prior holdings of the Court that a deed referring to the *surface* is plain and unambiguous. We refer to the case of *T. E. Rhomberg, et al., Appellants,* v. *The Texas Company, et al., Appellees,* General No. 26063—Agenda 35, January Term, 1942, Supreme Court of Illinois. In that case, the Supreme Court of Illinois had this to say:

> "April 16, 1908, Hickman, the grantee, conveyed by warranty deed the forty acres involved in this action to Thomas D. Stroup. This deed contained the following language: 'Reserving however, with the right to mine but without the right to break the surface, all the coal and minerals underlying said S. W. N. W. containing forty acres more or less situated in the County of Marion, in the State of Illinois.' * * *
>
> "Plaintiffs urge that if the reservation did not except oil and gas the deed is ambiguous and that proof of the surrounding circumstances discloses the intention of the parties was to include, rather than exclude, oil and gas. The reservation does not contain either a patent or latent ambiguity. The language used in the reservation very clearly expresses the intention of A. L. Rhomberg, namely, that he retained the ownership of 'coal and minerals' under the land he was conveying, but he convenanted that in extracting the coal and minerals reserved he would not break the surface of the land he was conveying."

Therefore, the Supreme Court of Illinois has since the opinion in this present case in the Circuit Court of Appeals again very definitely affirmed and recognized that the word "surface" is unambiguous and has a settled meaning in the State of Illinois. These Illinois cases

sufficiently show that this deed had a settled meaning in the State of Illinois and was unambiguous and that it referred to the superincumbent soil, distinct and separate from the coal, oil, gas and other minerals. Therefore, the title to the oil and gas remained in Thomas M. McKemie after he made the deed to the "surface only" to Mooneyham and passed through him to the Respondent in the present case.

The Circuit Court of Appeals stated that it believed that the case of *Jividen* v. *New Pittsburg Coal Co.*, 45 Ohio App. 294, 187 N. E., 124-125, stated the correct law. In that case it was said (italics ours):

> "The position of the plaintiff that the development of oil and gas was not contemplated by the parties when the deed was made, and therefore the deed should not be construed to include them, is weakened and cannot be maintained by reason of the clause in the deed, '*This deed to convey the surface only.*' The plaintiff seeks to assert her right by reason of language used in the deed that is uncertain as to its scope, while the defendant asserts its right by reason of prior language in the conveyance that is clear and unambiguous. By reason of this language the surface *only* was conveyed, and all of the remainder of the property was retained by the grantor. *It is true the grantor by express terms reserved all the coal and other minerals, but this was not necessary, as they had not been conveyed by the instrument which conveyed the surface only.*"

This rule of law is also recognized and followed by a majority of the Courts in this country and by the English Courts. Some of these decisions recognizing this almost universal rule are as follows:

In the case of *Marquette Cement Mining Co.* v. *Oglesby Coal Co.*, 253 Fed. (D.C.N.D. Ill.) 107-111, the Court said:

> "The word 'surface' in mining controversies means

> that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it."

In *Ericson* v. *Michigan Land & Iron Co.*, 50 Mich. 604, 16 N. W. 161-163, in commenting on a certain grant involved in that case, the Court said:

> "It differs materially, therefore, from a mere surface grant, which has sometimes been likened to the upper story of a building, entitled to support from below, but covering none of the subjacent land."

In the case of *Vandes, et al.*, v. *Wright*, 66 Ind., 319-325, the Court said:

> "It should be noticed throughout the cases above cited, that the word 'surface' as used in the books, means not merely the geometrical superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine."

In *Pountney* v. *Clayton*, 11 Q. B. D. (Eng.) 833, (as cited in Pope's Legal Definitions (1920), Vol. II., Page 1553), it is said:

> "The word 'surface' is used more limited, and the courts have said it excepts minerals."

The same rule is announced in *Keweenaw Assn.* v. *Friedrichs*, 112 Mich. 442, 70 N. W. 896; *Murray* v. *Allard*, 100 Tenn. 100, 43 S. W. 355, and *Dotson* v. *Norman*, 159 Ky. 786, 169 S. W. 527.

Counsel for Petitioners rely to a considerable extent on the case of *Ramage* v. *South Penn Oil Co.*, 94 W. Va. 81, 118 S. E. 162. In that case there was a deed which was not definite and plain like the deed in the present case, the *surface* of a tract of land was conveyed excepting and reserving in the grantors the oil and gas rights. The West Virginia Court held in effect that the *reserva-*

tion operated to give the word *"surface"* a secondary meaning apart from its usual significance, and that as the reservation simply referred to the oil and gas, the deed conveyed the coal. There is a decided difference between the conveyance in that case and the conveyance in the present case. That conveyance was ambiguous and difficult to be understood under its terms. The conveyance in the instant case is plain and unambiguous. Furthermore, in the *Ramage Case* there was a reservation and exception of the oil and gas, and in the present case there is no reservation or exception in the deed, but the deed recites that the grantee of the *surface only* takes it *subject to the prior deed of the coal to the Benton Coal Company*, the purpose of said recitation being to relieve the grantors of any liability on their warranty of title to the grantee of the surface only. Clearly, such recitation does not justify the giving of any secondary meaning to the word "surface" but leaves said word to be construed in its ordinary and usual sense.

The West Virginia Court has carefully explained the meaning of the *Ramage Case* in later cases and has clearly indicated that where there is no reservation or exception, such as there was in the *Ramage Case*, the conveyance of the surface *does not* include the oil and gas. This is well stated in the case of *Jeffrey* v. *Spruce-Boone Land Co.*, 112 W. Va. 360, 164 S. E. 292-293, where it is said:

> "After granting the coal and mineral and mining rights the deed also grants thirty acres of surface overlying a part of the coal and mineral granted by the first paragraph of the deed. 'The word "surface," when used without any qualifying phrase in a deed, ordinarily signifies only the superficial part of land.' *Drummond* v. *White Oak Fuel Co.*, 104 W. Va. 368, 140 S. E. 57, 56 A. L. R. 303."

Therefore, the West Virginia Court has adopted the rule that unless there is a reservation or an exception of a part of the minerals in a deed which conveys the surface, a deed to the surface does not convey any of the oil, gas or other minerals, which ruling is in full accord with the rule and definition of "surface" as recognized by the Supreme Court of Illinois in the cases hereinabove set forth. The *Ramage Case*, therefore, is clearly distinguishable from the present case and can have no application here.

The words "subject to" as used in this deed are not words of reservation or exception, nor can they create any affirmative rights. This is well stated in the case of *Englestein* v. *Mintz*, 345 Ill. 48, where the Court said (P. 61):

> "The words 'subject to', used in their ordinary sense, mean 'subordinate to,' 'subservient to' or 'limited by.' There is nothing in the use of the words 'subject to', in their ordinary use, which would even hint at the creation of affirmative rights."

It will be noted also that in the deed in question the word "surface" is further qualified by the word "only". The word "only" narrows the meaning of the word that it modifies and requires it to be more strictly construed. It makes certain the construction claimed by us that the settled meaning that the word "surface" excludes oil, gas and minerals here applies.

In the case of *Whittaker* v. *Illinois Central R. R. Co.*, 176 Fed. (C. C. E. D. La.) 130, it is pointed out that "only" means "solely." That is clearly what was intended to be conveyed by the deed in question, *solely* the *surface*, and not the oil, gas and minerals. As the deed conveyed merely the surface, the title to the oil and gas remained in the grantor, Thomas M. McKemie, and the

right to enter upon the surface and to mine and remove the same was necessarily implied. (*Threlkeld* v. *Inglet,* 289 Ill. 90, *Powers* v. *Heffernan,* 233 Ill. 597, *Continental Clay Co.* v. *Illinois Kaolin Co.,* 232 Ill. App. 596.)

Therefore because the Illinois cases hereinbefore cited clearly indicate that the Supreme Court of Illinois has recognized that "surface" is the superincumbent soil, separate and apart from the coal, oil, gas and other minerals, it was the duty of the Federal Court, in deciding this case, to follow this well-recognized and settled Illinois rule, and the decision of the Circuit Court of Appeals in this case was clearly right.

III.

The evidence of custom offered in this case and admitted by the District Court for the Eastern District of Illinois was inadmissible and the deed in this case was unambiguous and no evidence of custom under the Illinois Authorities was admissible to add to, change or vary the terms of the deed (Defendants' Exhibit 1, Tr. 82).

The District Court erred in this case in not construing the deed (Defendants' Exhibit 1, Tr. 82) from the language found therein and in erroneously holding that the term "surface" was ambiguous and had no settled meaning, and in erroneously admitting and considering extrinsic evidence and determining what this deed meant from that intrinsic evidence.

We will not take the time of this Court to discuss this extrinsic evidence which appears in the record (pp. 120-143) but it will be noted that none of this evidence, even though it would be considered admissible—and we earnestly contend that it is not—was such evidence as would properly establish custom. At most, this alleged custom

evidence was simply an attempt to have a witness give his opinion some thirty years, or more, after a deed was made as to what was in the mind of the grantor and the grantee at the time of the execution of the deed. It amounted to pure speculation as to what was the intention of the parties making the conveyance. If such evidence was admissible, there would be no title in the United States which would be safe or secure and all titles would be subject to be overcome and upset by the mere speculations and conclusions of witnesses expressed after litigation was started years after the conveyances were made. Without burdening the Court with a discussion of this custom evidence, it suffices to say that the Supreme Court of Illinois has already laid down the rule as to when evidence of custom is admissible in the case of *Gilbert* v. *McGinnis, et al.*, 114 Ill. 28-33, where it is said:

> "*That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition* or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject but it has been often fully recognized by this court. *Cadwell* v. *Meek*, 17 Ill. 220; *Bissell* v. *Ryan*, 23 id. 566; *Deshler* v. *Beers*, 32 id. 368; *Wilson* v. *Bauman*, 80 id. 493. In the editor's note to *Wigglesworth* v. *Dalleson*, Smith's Dealing Cases, 309, it is said: 'Evidence of usage, though sometimes admissible to add to or, explain, is never *to vary or to contradict*, either expressly or by implication, the terms of a written instrument,'—citing in support of the proposition, *Magie* v. *Atkinson*, 2 M. & W. 442, *Adams* v. *Worldley*, 1 id. 374, *Freeman* v. *Loeder*, 11 A. & E. 589, and *Gates* v. *Pym*, 6 Taunt. 445."

In *Cihak* v. *Klekr*, 117 Ill. 643-655, it was held that a witness is not competent to testify as to the intention of a person in making a plat, the Court saying (italics ours):

> "At the time Mrs. Hubbard put the designation

'private alley' on the plat, the alley was being so used, and she was the owner of the ground on both sides of the alley, with a building standing on the west line of the alley, constructed with special adaptation for the use of the alley. The alley was important for the beneficial enjoyment of her lot on the west side of the alley, and must have enhanced its value. There was no apparent purpose why the alley should not be as much for the use of the owner's ground on the one side of the alley as on the other side.

"Under such circumstances, we think the meaning of private alley was, that the alley was private to the owner's own ground; that the alley was for the use of the owner's lots only, but of her lots abutting on both sides of the alley, and not for the use solely, of her lots on one side of the alley. *We give no consideration to the manifestly incompetent testimony of E. K. Hubbard, that his wife's intention was to reserve the alley as a private alley for the use of Lots 1, 2, 3 and 4. It was not competent for him to swear to his wfe's or anyone's else intention.*"

The petitioners attempted to justify the admission and consideration of this oral evidence by citing and relying on the case of *Magnolia Petroleum Company* v. *West*, 374 Ill. 516-520. However, that case is in no way similar to the present case upon the facts and does not apply or have any bearing upon the present case. As pointed out by the case of *Rhomberg* v. *The Texas Company, supra*, decided by the Supreme Court of Illinois in January of this year, the present deed is plain and unambiguous and this extrinsic evidence was entirely incompetent and inadmissible.

As said in the case of *Decatur Lumber Co.* v. *Crail*, 350 Ill. 319-323:

"While it is the general rule that in construing a contract it is proper for the court to take into consideration the surrounding circumstances, this does not give the court the right, by construction, to estab-

lish a different contract from that expressed in the written agreement."

Also, this same rule is announced in the case of *Armstrong Paint Works* v. *Can Co.*, 301 Ill. 102-105.

The Memorandum of the District Court, for the Eastern District of Illinois, shows that the Court relied on this testimony as a basis for his decision and the construction of the Deed (Defendants' Exhibit 1, Tr. 82) in spite of the fact that it was clearly improper and inadmissible under any theory.

The Circuit Court of Appeals did not have occasion to discuss this improper and incompetent evidence because it expressly held that under the Illinois authorities this deed was unambiguous and that, therefore, such evidence was inadmissible. Nevertheless the evidence which was admitted by the District Court could have no bearing upon this case and added nothing when it came to the construction of this deed. Its admission is another controlling reason why the opinion of the Circuit Court of Appeals in the present case is correct and why the opinion of the Circuit Court of Appeals should not be disturbed upon writ of certiorari.

IV.

In this case there was a correction deed (Plaintiff's Exhibit 6, Tr. 162-163) subsequently executed and delivered which correction deed expressly reserved the coal, oil, gas and other minerals under this two-acre tract, and this correction deed is controlling in determining what the parties intended to convey and did convey by the prior conveyance (Defendants' Exhibit 1, Tr. 82).

In this case there was a correction deed (Plaintiff's Exhibit 6, Tr. 162-163) subsequently executed and deliv-

ered, which correction deed reserved the coal, oil, gas and other minerals under this two-acre tract and this correction deed is controlling in determining what the parties intended to convey and did convey by the prior conveyance (Defendants' Exhibit 1, Tr. 82).

In 1918 Thomas M. McKemie mortgaged all of the forty acres including the two acres in question to the Newton State Bank and Trust Company, and thereafter, to correct the erroneous inclusion of the surface of the two acres in said mortgage, on July 18th, 1922, he and his wife executed a quit-claim deed for the two-acre tract to J. A. Dalby of Benton, Illinois, the then owner of the surface of the said two-acre tract. The deed to Dalby is Plaintiff's Exhibit 6, in which there was *reserved* to the grantors, the McKemies, the coal, oil, gas and other minerals underlying the said two-acre tract (Tr. 162). Prior to that date, on October 7th, 1921, McKemie had executed to his wife a quit-claim deed based upon a consideration of One Dollar and love and affection to all of the southeast quarter of said Section 24, which included the two-acre tract in question and included his interest in the oil and gas and other minerals thereunder. (Plaintiff's Exhibit 3, Tr. 58-62).

It was also in connection with the execution and delivery of this deed (Plaintiff's Exhibit 6) that McKemie executed and delivered the affidavit (Defendants' Exhibit "I") explaining why he gave the mortgage on this two-acre tract, and this affidavit (Defendants' Exhibit "I") must be read and considered in the light of the deed (Plaintiff's Exhibit 6), by which deed McKemie expressly stated that he reserved the coal, oil, gas and other minerals underlying this two-acre tract of land.

As set forth in Finding of Fact Number Five (5) (Tr. 179) J. A. Dalby, the grantee in said deed (Plaintiff's

Exhibit 6), was then the owner of the interest in the land conveyed by Defendant's Exhibit 1 to Walter S. Mooneyham, being the deed upon which the Petitioners base their title.

The acceptance by Dalby of the deed containing the *reservation* of the coal, oil, gas and other minerals underlying the two-acre tract amounted to an agreement between the McKemies and Dalby that the deed in controversy here (Defendants' Exhibit 1) did *not* convey the oil and gas and other minerals and to such construction of the prior deed by them.

The law has been announced by the Supreme Court of Illinois and by other jurisdictions that where there is a correction deed subsequently executed, delivered and accepted, it is controlling in determining what the parties intended to convey and did convey by the prior conveyance. In the case of *McConnel* v. *Reed,* 5 Ill. 117-122, it is said in this connection:

> "This deed being posterior, both in execution and registry, to either that relied upon by the plaintiff or defendant, it could have been introduced only for the purpose for which it was made. It professes to be made for the purpose of removing all doubt and uncertainty as to the meaning and intention of the grantor, in making the deed of release to McConnel. It must therefore be conclusive against the plaintiff, as to the meaning of that deed—the limit and extent of its operation. By this deed the grantor declares it to have been his intention and design, in making the deed of release, to transfer and convey absolutely all right, title and interest, etc., that he then had in and to said land. This explanation seems clear and susceptible of but one meaning. He intended to convey all the land which, at the time of the conveyance, he then had right and title to. * * * This construction is in accordance with the explanatory deed, and in conformity to the rule adopted in the case of *Brown* v. *Jackson,* and which, as the Court

there says, is a reasonable one, founded upon the apparent intention of the parties. Upon any other construction, the deed of release would be a fraud upon the prior purchaser; but in this way both deeds may well stand together, consistently with the innocence of all parties.

"No objection can be raised by the plaintiff, to the adoption of the explanation of the deed of release afforded by the deed of bargain and sale. It is a rule of interpretation furnished by himself, and he must abide the consequence of its application and effect."

This rule is in accordance with the general rule adopted by the Supreme Court of Illinois that where parties to a contract have given it a practical construction, such construction is entitled to great weight in determining its proper interpretation. (*Sholl* v. *Peoria and P. U. Ry. Co.*, 276 Ill. 267, and *Rosenbaum* v. *Devine*, 271 Ill. 354.)

This is another and additional reason why the opinion and decision of the Circuit Court of Appeals in this case is correct and should not be disturbed. The Circuit Court of Appeals did not discuss this proposition in its opinion because it was not necessary for it to do so, it having decided that the Deed (Defendants' Exhibit 1) was unambiguous, and that upon its face it showed that it was only intended to convey the superincumbent soil and did not include the oil and gas. However, the subsequent deed (Plaintiff's Exhibit 6), which was a correction deed, specifically reserving the coal, oil, gas and other minerals, strengthens the interpretation put upon the prior deed (Defendants' Exhibit 1) by the Circuit Court of Appeals and it becomes unescapable that the construction placed upon the prior deed by said Court in the present case is correct.

CONCLUSION.

The Circuit Court of Appeals properly reversed the District Court, and in so doing followed the established judicial precedent. It is, therefore, respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant the writ of certiorari.

Respectfully submitted,

CRAIG VAN METER,
Mattoon, Illinois,

FRED H. KELLY,
Mattoon, Illinois,
Attorneys for Shell Oil Company, Incorporated, a Corporation, Respondent.

JOHN C. QUILTY,
Centralia, Illinois,
Of Counsel.